SUPREME COURT, U. S.
73-824

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1208

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LAWRENCE F. BECKER,
Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1. OPINIONS BELOW

Petitioner was convicted in the United States District Court for the Eastern District of Michigan, Southern Division, on September 22, 1972. Sentence was imposed on November 9, 1972. The Sixth Circuit Court of Appeals affirmed the conviction, and on October 5, 1973, handed

down an opinion set forth in Appendix A. A dissenting opinion was also issued by the Honorable Wade McCree, Circuit Judge, and is set forth in Appendix B.

The opinion and order denying suppression of the 1800 pills taken from the closed drawer of the bureau issued by the trial court is set forth in Appendix C.

2. JURISDICTION

The opinion and judgment of the Sixth Circuit Court of Appeals was entered on October 5, 1973. The jurisdiction of this Court is invoked pursuant to 28 USC 1254.

3. QUESTIONS PRESENTED

I

Was the search of a closed drawer of a bureau three to five feet away from appellant legal as incident to arrest under *Chimel* v *California*, 395 US 752 (1969), where appellant had been searched and was under the control of the arresting officers who had put their guns away?

II

Was appellant's Fourth Amendment right to be free from unreasonable searches and seizures violated by federal narcotics agent's warrantless arrest of him in his home where no exigent circumstances existed that precluded the necessity of obtaining a warrant?

III

Was appellant's right under the Fourth Amendment further violated by the forcible, nighttime entry of his home in the absence of exigent circumstances?

IV

Did federal agents have sufficient probable cause to believe that appellant had committed a crime?

V

Was appellant's arrest merely a pretext for a search for tangible evidence?

4. STATUTE AND CONSTITUTIONAL PROVISIONS

The Constitutional provision involved herein:

The Fourth Amendment to the Constitution of the United States of America:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5. STATEMENT OF THE CASE

The appellant, Larry Becker, was arrested in his apartment by federal narcotics agents for conspiracy to violate federal narcotics laws at around 12:30 a.m. on March 4, 1972.

Prior to that time an undercover agent had overheard Joseph Jacobini arranging a narcotics transaction by phoning a certain number and talking with "Larry." The number was later identified as Larry Becker's and eight to ten federal narcotics agents went immediately to his home where they made a warrantless, forcible entry to arrest him. A search was made of the entire apartment and narcotics were found.

A three-count criminal indictment No. 46951 was returned by the Federal Grand Jury for the Eastern District of Michigan alleging Joseph Jacobini, Larry Becker and one Terry McManus to be in violation of 21 USC 841 (a) (1).

On May 22 and June 28, 1972, a hearing to suppress all the evidence obtained from the premises of Larry Becker, appellant herein, was held before the Honorable Cornelia G. Kennedy in the United States District Court for the Eastern District of Michigan, Southern Division.

On August 11, 1972, Judge Kennedy issued an order suppressing all items seized on the second floor but denying suppression as to the 1800 pills taken by agent Mahon from the closed drawer of the bureau, holding they were validly seized incident to arrest.

Trial on this matter took place on September 22, 1972 before Judge Kennedy and appellant was found guilty as

to count three of the indictment, the government having dismissed counts one and two.

Appellant was sentenced on May 9, 1972.

Appellant appealed from the judgment of conviction, and the Sixth Circuit Court of Appeals affirmed the conviction on October 5, 1973.

6. REASONS FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals plainly abandoned its responsibility to protect the Fourth Amendment right of all persons to be free from unreasonable searches and seizures in an ill-considered opinion affirming Appellant's conviction based upon illegally seized evidence which should properly have been suppressed at the District Court level. In light of past holdings of this Court, and the facts as brought out in testimony, it is glaringly apparent that the decision below is erroneous.

I

THE SEARCH OF A CLOSED DRAWER OF A BUREAU THREE TO FIVE FEET AWAY FROM APPELLANT WAS NOT LEGAL AS INCIDENT TO ARREST UNDER CHIMEL v CALIFORNIA, 395 US 752 (1969), WHERE APPELLANT HAD BEEN SEARCHED AND WAS UNDER THE CONTROL OF THE ARRESTING OFFICERS WHO HAD PUT THEIR GUNS AWAY.

A search incident to a valid arrest has long been recognized as an exception to the Fourth Amendment warrant requirement. See *Weeks* v *United States*, 233 US 383, 392 (1914) (dictum), and cases cited therein. Since 1969, the permissible scope of such a search has been defined by *Chimel* v *California*, 395 US 752, 763 (1969):

"When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule . . . There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

Appellant Larry Becker maintains that the 1800 LSD pills obtained from the closed bureau drawer were not seized as the result of a valid search incident to arrest. The federal agents' testimony would have the Court believe that this particular search was for weapons, but the facts reveal no reason to believe that their safety was in fact endangered:

1. Eight to ten federal agents with sidearms drawn forced their way into Larry Becker's apartment to find him lying on the couch, dressed informally, not in any way prepared for their arrival.

2. The agents had no reason whatsoever to believe that Larry Becker was armed and/or prone to violence, nor was the crime for which he was being arrested one of violence (T.#1, 62).

3. Two agents directed him to a position not of his own choosing where he was placed up against a wall with feet spread.

4. Although he was not handcuffed at the time of the search, at least two agents, armed and of imposing physical proportions, were assigned to watch him and were within his immediate physical presence.

5. Although Larry Becker turned around on a number of occasions, it was clearly for the purpose of making inquiries (A. 14).

6. At the time Agent Mahon went into the closed drawer, Larry Becker had been searched, effectively "neutralized", and the agents guarding him had put away their guns. The officers' own testimony indicates they were at that time not in fear of him (A. 10).

7. There is no indication that Larry Becker at any time made any overt actions toward the bureau.

8. The bureau drawer was closed.

9. Had the agents any concern about their safety, several practical and expeditious alternatives not involving a further warrantless invasion of Larry Becker's privacy were available.

Appellant argues that these facts provide the basis for invalidating the search incident to arrest here under discussion in four ways.

A

Searches of Closed Drawers Are Forbidden in the Very Language of Chimel.

> "A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested . . .
>
> "There is no comparable justification, however, for routinely searching any room other than that

> in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. *Chimel, supra,* at 763.

In a scathing dissent from the majority opinion in the instant case, Circuit Judge McCree recognized that the search was unconstitutional:

> Applying *Chimel's* rationale to these facts, we must conclude that the opening of the desk drawer was impermissible. As the majority opinion quotes, *Chimel* makes a distinction between a gun on a table or in a drawer in front of one who is arrested and desk drawer and closed areas in the room in which the arrest is made.
> *United States* v *Becker,* 73-1208, p. 15 (1973).
> J. McCree, dissenting (A-56).

B

Chimel Poses A Purposive Test, Not An Area Test.

A search such as the instant one offends not only the language but the purpose of *Chimel.* Perhaps the most basic difficulty in applying *Chimel* arises out of the meaning to be given to the words "area within his immediate control . . . the area from within which he might gain possession of a weapon or destructible evidence." Is this standard properly defined as a general *area* of specified radius with the arrestee at the center which may be searched regardless of the specific circumstances obtaining at the time of the arrest? Or is it more accurately understood as a *purposive* definition requiring each case to be evaluated in terms of the arrestee's actual capability to reach a weapon or destroy evidentiary matter?

Appellant maintains that the "area test" reflects a fundamental misunderstanding of the import of *Chimel.* Prior to *Chimel,* the scope of searches incident to arrest was of such a nature as to allow general, exploratory searches of an arrestee's home without reference to the alleged purpose of the search. These cases justified such searches with words identical to *Chimel,* "within his immediate control." See e.g., *Harris* v *United States,* 331 US 145, 151 (1947) and *United States* v *Rabinowitz,* 330 US 56, 61 (1950).

This Court specifically resisted the temptation to merely distinguish *Harris* and *Rabinowitz;* they were specifically overruled by *Chimel* at 768. The fact that *Chimel* has been held not to be retroactive evidences that it was considered to be such a sharp break with the past that retroactive enforcement would unfairly burden the courts and law enforcement agencies. The area interpretation of *Chimel,* however, differs only in degree from *Harris* and *Rabinowitz.* It still allows arresting officers to make an exploratory search, only decreasing the permissible parameters. It still results in a situation where a citizen's right to privacy is determined serendipity by the circumstances of when and where he is arrested.

The true meaning of the *Chimel* decision was to make a change in *purpose,* not merely degree. Only the purposive test does this, as some courts have recognized by applying it although not articulating it as such.

The Sixth Circuit Court of Appeals has done so recently in *United States* v *Shye,* 12 CrL 2437 (6 Cir, 1/23/73). *Shye,* at 2438, upheld the District Court's finding that a sack of money taken from behind the water heater of the defendants' apartment as incident to arrest was unlawfully seized, saying:

> "The Court emphasized in *Chimel* that warrantless searches, whether or not incident to arrest, were the exception, not the rule, and that only the exigencies of preventive harm to the arresting officers, the escape of the suspects, or the destruction of evidence justified search of the arrestee's person and of the area within his immediate control. When the circumstances at which this limited exception was aimed do not exist, no reason appears for invoking it. In this case, the suspects were lined up against a wall and were quickly searched for weapons, a search which revealed only six bullets in the pocket of defendant Stevenson. The District Court found that when the sack of money was seized, "the officers had the situation completely under control," that the sack was merely one of a number of items in the closet in which the water heater was situated, and that a police officer was positioned between the closet and the nearest suspect. On these facts the court concluded that the area from which the sack was seized was not within the suspect's immediate control as that area is defined in *Chimel* . . .

In the instant case, the majority opinion of the Sixth Circuit Court of Appeals distinguished *Shye,* "insofar as the record discloses no officer was positioned between appellant and the desk until Officer Mahon moved to the desk to look for weapons." *supra,* p. 7, and because Becker was, hands on the wall and spreadeagled, turning around to ask for a warrant.

Appellant maintains that the officers in the instant case "had the situation completely under control". The Court's reasoning, which seems to require the existence of a police officer between an arrestee and any subject, notwithstanding the fact that arresting officers have already subdued him, is specious.

United States v *Baca,* 417 F2d 103 105 (10th Cir 1969), *cert. den.* 404 US 979 held the search of an arestee's apartment could not be justified when he was "physically confined to a limited area with the 9 x 12 bedroom," or when he was "handcuffed with his hands behind his back." The Court went on to say:

> "Moreover, it cannot be said that the inside of his bureau drawers, night stand, under the bed or any similar area was under any type of control by Baca inasmuch as he was handcuffed with his hands behind his back and was unable even to dress himself. *Id,* at 105."

The Tenth Circuit held on another occasion that the Trial Court erred in denying a motion to suppress a shotgun recovered from the trunk of a car after an arrest on a "gas skip" in *United States* v *Miles,* 449 F2d 1272, 1273 (1971), saying:

> "The police officers both testified that *neither Miles nor Burns could have gotten into the truck.* The search was therefore unreasonable, and a violation of Miles' constitutional rights." (Emphasis added.)

In *Berlin* v *State,* 19 Md App 48, 57, 277 A2d 468, 473 (1971), a New York Court allowed the seizure of an Exempt Narcotics Book because it was in plain sight but indicated:

> "The area of immediate control cannot be measured in feet, or by the arm's length, but is to be measured reasonably with respect to the accessibility of the articles and their nature."

Appellant would analogize from the words of a pre-*Chimel* case, *Preston* v *United States,* 376 US 364, (1964):

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, or as well as by the need to prevent the destruction of evidence of the crime —things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. *But these justifications are absent where a search is remote, in time or place from arrest.*" (Emphasis added.)

Appellant contends that these justifications are also absent when there is no realistic possibility that an arrestee can physically reach an area.

As Judge McCree noted in his dissent, *supra*, at p. 12:

> "This maneuver positioned Becker spread-eagled against the kitchen wall and Finnegan searched him and found no weapons. The officers were so sufficiently satisfied that Becker was secured that they put away their firearms and fanned out throughout the house in what can only be characterized as a general search. Small wonder that Becker kept turning around to inquire whether the officers had a warrant. To seize on his constitutional query as evidence that he had not been secured in order to justify the search of the closed drawer of the desk 3 to 5 feet away placed in an impossible dilemma. Unless he submitted to the unconstitutional search of his house, he invited the finding that he was endangering the officers and thereby justified the search the validity of which he sought to ascertain" (A. 50, 51).

C

Officers May Not Routinely Search a Person or The Immediate Area After An Arrest.

A warrantless search incident to arrest can be justified only where, in fact, there evists a need to prevent the arrestee's escape, to prevent destruction of evidence, or to insure the safety of the arresting officers. As such, *Chimel* quotes and affirms the teaching of *Trupiano* v *United* States, 334 US 699, 708 (1948), which *Rabinowitz* overruled:

> "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant. *Carroll* v *United States, supra,* 158. Otherwise, the exception swallows the general principle, making a search warrant completely unnecessary wherever there is a lawful arrest. And so there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant."

Arresting Officers then, are not entitled, merely by virtue of making a valid arrest, to routinely search the person and the area:

> "In the rare case where a search is necessary for the protection of the arresting officer or to prevent the destruction of evidence, the police have been given power to conduct a limited search." Note, 74 *Dickinson L Rev* 361, 365 (1970).

There will be many cases where an arresting officer is not entitled to make *any* search at all. *Chimel,* at 762, discusses the rationale for a protective search in stop and frisk situations set out in *Terry* v *Ohio,* 392 US 1 (1968) and indicates that a "similar analysis underlies" the search incident to arrest principle. Thus, *United States* v *Green,* 465 F2d 620, 622 (DC Cir 1972), points out:

> "Sanction of searches incident to arrest, however, 'does not mean that [the person arrested] is subject to any and all searches that the arresting officer may wish to conduct.' *United States* v *Mills,* US App DC , F2d (1972) (en banc). '[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences reasonably warrant that intrusion.' *Terry* v *Ohio,* 392 US 1, 21, 88 SCt 1868, 1880, 20 LEd 2d 889 (1968). The touchstone both as to whether the search is warranted and the propriety of its scope remains reasonableness."

Green involved a search growing out of a traffic stop but the principles of law there enunciated are applicable to any search incident fact situation. In evaluating the facts of *Green,* the Court there went on to state:

> "While these facts remonstrate fear on the part of the officers, this is not sufficient for our purposes. The fear must be a reasonable one. As the Supreme Court has stated, 'it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?' *Terry* v *Ohio, supra,* 392 US 1 at 21-22, 88 SCt at 1880."

Not only would the facts of the instant case not "warrant a man of reasonable caution" in the belief that Larry

Becker posed a threat to the officers' safety, but, as has been previously pointed out, the officers' actions and testimony indicate that they were, in fact, not in fear.

That the resulting search was in fact unreasonable under the circumstances, is immediately apparent. In commenting upon the instant case in his dissent, Judge McCree agreed that the search was impermissible even assuming that the primary purpose of the arresting officers was to effectuate an arrest:

> "In this appeal, Becker had been searched and was disarmed, and the officers felt sufficiently secure to put away their weapons. There were 8 to 10 armed agents in the house. Becker's only activity after their entry was to turn away from the wall to inquire about the existence of a search warrant.
>
> Agent Ray testified that when he first saw Becker (about 5 minutes before the L.S.D. was found), 'He was secured. There were agents with him and I thought safe at that point . . . '
>
> Agent Mahon testified . . . that Becker was "neutralized" within half a minute after he had been moved to the wall where he was searched. He testified, 'I would think after a while once it was finally determined there was no threat of physical harm, the weapons were put away.' Upon being asked by the Assistant United States Attorney what he meant by "subdued", Mahon replied, 'What I mean is he was no longer in a position to pull a gun or anything'." (A-55)

D

Officers May Not Make A Warrantless Search If Other, Less Intrusive Alternatives Are Available

Even assuming, *arguendo*, the officers had a legitimate fear for their safety, obvious alternatives to searching for weapons existed. The entire thrust of *Chimel* is to give meaning to the Fourth Amendment, the vehicle through which the founding fathers of this country expressed the high regard which they placed on the individual's right of privacy:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the person or things to be seized." US Const. Amend. IV.

As *Chambers* v *Maroney*, 399 US 42 (1970), illustrates, when the privacy of a citizen is at stake it is entirely reasonable, in fact imperative, for police and the courts to consider and utilize the least offensive means of achieving their desired goal. The Court in *Chambers, supra* at 51-52, attempted to determine which was the "greater" and which was the "lesser" intrusion, an immediate warrantless search of a car or impoundment in order to get a search warrant. The Court could not agree on a significant differentiation in that situation, but in the present case it is clear that merely removing Larry Becker from the premises to one of the waiting police cars would have been quicker, easier, more efficacious and certainly less intrusive upon his Fourth Amendment rights. This alternative was ignored.

As Judge McCree noted in his dissent, *supra:*

> "If the sole purpose of the entry was to arrest Becker the Agents could have removed him from the house and they would have been miles away on the journey back to the Federal Building before this seizure. Becker could just as easily have been escorted out the door when Agent Finnegan, 'grabbed him by the arm and directed him over to the wall to put his hands up against the wall to be patted down and searched for any weapons.'" (A-50)

II

APPELLANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WAS VIOLATED BY FEDERAL NARCOTICS AGENTS' WARRANTLESS ARREST IN HIS HOME WHERE NO EXIGENT CIRCUMSTANCES EXISTED THAT PRECLUDED THE NECESSITY OF OBTAINING A WARRANT.

A

Warrantless Arrest Entries Upon Probable Cause Absent Exigent Circumstances Violate The Fourth Amendment.

Appellant acknowledges that a warrant for arrest, unlike a warrant for search, has not been held to be a constitutional requirement. However, it is maintained that this disparity offends the Fourth Amendment, is conceptually indefensible and is lately becoming the focus of serious concern on the part of the courts.

The very language of the Fourth Amendment suggests no basis for a less rigorous standard for arrest warrants:

> "The right of the people to be *secure in their persons, houses, and effects,* against unreasonable searches and sezures, shall not be violated, and no Warrant shall issue, but upon probable cause sup-

ported by Oath or affirmation and partiuclarly describing *the place to be searched, and the persons or things to be seized.*" US Const, Am IV (Emphasis added.)

The language does not differentiate between "persons" and "things' 'in guaranteeing reasonableness or in delineating what may be seized. And this Court has noted that an arrest by definition is the seizure of a person. *Terry* v *Ohio*, 392 US 1, 10 (1968).

At least one commentator has dealt specifically with the problem of warrantless arrest entries. Siegesmund, 23 *Stanford L Rev* 995 (1971). That author asserts that an arrest constitutes search for and seizure of a person and maintains that:

> ". . . an arrest entry, the entry or search of a private place to effect an arrest, properly falls within the range of problems which the Fourth Amendment addresses, and that, except in circumstances of necessity, the amendment requires a search warrant before a police officer may enter a home to effect an arrest."

The District of Columbia Circuit, which has been the leader in focusing concern on the problem of warrantless arrest entries, had earlier taken the same view in *Morrison* v *United States*, 262 F2d 449, 452 (DC Cir 1958):

> "The officers entered the house [Morrison's] to make a search. It was, to be sure, a search for a person rather than the usual search for an article of property, but it was a search . . . It is true [the officers] intended to arrest [Morrison] if they found him, and so the ultimate objective was an arrest. The Government urges that this latter fact resuires that we apply the rules of law pertaining to arrest rather than the rules governing search.

> But the search was a factual prerequisite to an arrest; it was the first objective of the entry; the officers did in fact search the house. They entered to make a search as a necessary prerequisite to possible arrest."

The Court in *Morrison* held that the arrest was illegal in the absence of a warrant or some emergency, even though the officers had probable cause to arrest and probable cause to believe the defendant was in his home.

Appellant maintains that the Courts make a mockery of the Fourth Amendment when they construe it to provide more protection for one's possessions than for one's very person. The Fourth Amendment protects persons' right of privacy; that right applies no less to the individual himself than to his possessions. Freedom to make warrantless entries inevitably gives rise to abuses such as had to be corrected by *Chimel* v *California*, 395 US 752 (1969) and those perpetrated in the instant case.

The courts have increasingly begun to recognize the problem of warrantless arrest entries.

Justice Harlan in *Jones* v *United States*, 357 US 493, 499-500 (1958) questioned:

> " . . . whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment."

Jones did not have to reach that question, but Justice Harlan indicated that it raised a "grave constitutional question" at 499.

This Court pointed out in *Terry* v *Ohio*, 392 US 1, 20 (1968), that although they were validating the "stop and frisk" of persons under certain specified conditions,

> "We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure [citations omitted], or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances."

And most recently and most explicitly, in *Coolidge* v *New Hampshire*, 403 US 443, 477, 478 (1971), this Court has touched upon the question even though it was not the ultimate basis for the decision:

> "It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances'."

After evaluating the approach of dissenting Justice White, the Court decided that:

> "If we were to agree with Mr. Justice White that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise *per se* reasonable given probable cause, then by the same logic *any* search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution. Indeed, if Mr. Justice White is correct that it has generally been assumed that the Fourth Amendment is not violated by the war-

> rantless entry of a man's house for the purposes of arrest, it might be wise to re-examine that assumption." *Id,* at 480.

However, not all courts *have* shared Mr. Justice White's assumption and it may be instructive for this Court to examine *Dorman* v *United States,* 435 F2d 385 (1970), where the District of Columbia Circiut held that, absent exigent circumstances, a warrant is needed to make an arrest in a home:

> "The Supreme Court has not explicitly passed on this question. The literature abounds in discussion of the permissibility of an arrest made without a warrant, but there is little if any analysis focusing on entry into a dwelling for the purpose of an arrest. However, we think the pertinent principles, and their application to the case before us, are fairly to be apprehended from the Fourth Amendment precedents . . . at 388-389 . . .
>
> . . . The Fourth Amendment provides protection even as to arrest in a public place, though in such cases the requirement is only that there be probable cause and there is no additional requirement of recourse to a warrant. A greater burden is placed, however, on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment. In general a home may not be searched without a warrant notwithstanding probable cause. At 389 . . .
>
> . . . the basic principle, the constitutional safeguard that, with room for exceptions, assures citizens the privacy and security of their homes unless a judicial officer determines that it must be overridden, is applicable not only in case of entry to search for property, but also in case of entry in order to arrest a suspect. At 390."

B

"Keeping Drugs from Going Out for Public Consumption" Does Not Constitute A Legitimate Exigent Circumstance Excusing The Warrant Requirement.

The government contends that there were exigent circumstances in the instant case which necessitated immediate action and allowed no time to obtain an arrest warrant. Their allegation is that prompt action was necessary or "the material would go out to the public for consumption." Appellant maintains that this is not a legitimate exigent circumstance excusing the obtaining of a warrant.

There are logical problems with the government's argument. First, although there were a large number of agents working on the case and those agents had the telephone numbers of United States Magistrates and District Judges, *no one* made *any attempt* whatsoever to obtain a warrant. Second, this explanation of exigency does not coincide with the near-unanimous stated purpose of the agents in going to Larry Becker's home, i.e., to *arrest* him for conspiracy to violate the drug laws. Third, the agents pointed to no concrete specific facts supporting the idea that the drugs would in fact be immediately going out for public consumption; how they could validly assume this, especially where the supposed purchaser of them, Joseph Jacobini, was then in custody, is unclear. And last, on a conceptual basis for the Court to accept this as an exigent circumstance would be to give blanket permission for warrantless invasions of the homes of suspected narcotics dealers because there is always a *chance* that drugs will at some point go out for public consumption.

The term "exigent circumstances" cannot be precisely defined because of the variety of circumstances possible.

Broad categories of exigency, primarily in regard to justifying warrantless searches, have been laid out by the courts, however. They are all grounded on some type of urgent necessity and include:

1. Limited search incident to a valid arrest, if there exists a danger to the officer's personal safety or of destruction of evidence. *Chimel* v *California,* 395 US 752 (1969).

2. Stop and frisk on the street, to insure safety of the officer or those in the immediate vicinity. *Terry* v *Ohio,* 392 US 1 (1968).

3. Hot pursuit of a suspected criminal, to protect officers and prevent the escaping of fleeing felons. *Warden* v *Hayden,* 387 US 294 (1967).

4. Search of a moving vehicle. *Carroll* v *United States,* 267 US 132 (1925); *Chambers* v *Maroney,* 339 US 42 (1970).

5. Evidence in the process of destruction. *Schmerber* v *California,* 384 US 757 (1966).

The latter category is the closest to the exigent circumstance the government here urges so it is important to point out that before this category comes into play it must be shown not only that evidence is in the *process* of destruction, but this must be indicated by specific ascertainable factors. *People* v *Gastello,* 67 Cal 2d 586, 432 P2d 706 (1967). Otherwise, a "blanket exception" is created which the experience of California courts has shown to be unacceptable. *People* v *Santiago,* 71 Cal 2d 18, 453 P2d 353 (1969).

It was early decided that police inconvenience or avoidance of delay were not exigent circumstances. *Johnson* v *United States,* 333 US 10 (1948).

The high degree of exigency required has most recently been pointed out by this Court in *Vale* v *Louisiana,* 399 US 30 (1970), where the dissent proposed the general rule that warrantless searches at the scene of the arrest be permitted if the officers making the arrest "have probable cause to search and there is a clear danger that the items for which they may reasonably search will be removed before they return with a warrant" *Id,* at 39. However, the Court held such a search did not come within any of the established exceptions to the warrant requirement, including the threatened-destruction exception because "[t]he goods ultimately seized were not in the process of destruction," at 35.

There is no reason why the same considerations should not apply to warrantless arrest entries. Returning again to *Dorman* v *United States,* 435 F2d 385 (1970), the District of Columbia Cirucuit Court held that a "principle of need" operates to justify a judicial officer in issuing a warrant authorizing an invasion of the privacy of a home but a different principle, that of "urgent need" operates when the decision is made by an officer rather than the court. The Court at 392-393 listed factors pertinent to determining whether that degree of need exists:

1. "that a grave offense is involved, particularly one that is a crime of violence."

2. ". . . that the suspect is reasonably believed to be armed."

3. "that there exists not merely the minimum of probable cause . . . but beyond that a clear showing of probable cause . . . "

4. "strong reason to believe that the suspect is in the premises being entered."

5. "a likelihood that the suspect will escape if not swiftly apprehended."

6. "the circumstance that the entry, though not consented, is made peaceably . . . The fact that entry was not forcible aids in showing reasonableness of police attitude and conduct."

7. " . . . the fact that an entry is made at night raises particular concern over its reasonableness . . . and may elevate the degree of probable cause required."

The Court went on to point out that the police once inside made a search only to locate the suspect: "There was no rummaging of drawers, etc., to cloud the purpose of the police," at 394. In upholding the warrantless arrest in this particular case, the Court also noted that the police did make an attempt to get a warrant and due to unique circumstances existing at the time, were unable to reach a magistrate. *Supra,* at 394.

It hardly needs to be pointed out that the facts of the instant case pale when measured by the above criteria. Nor does the proposed exigent circumstances fall within one of the recognized exceptions. And, as the Sixth Circuit Court of Appeals has held in *United States* v *Wysocki,* 459 F2d 884, 888 (1972), exigent circumstances must be narrowly construed, particularly when they are sought to be applied to residential invasions.

Appellant would further contend that here again there exist reasonable, less offensive alternatives. *Chambers* v *Maroney,* 399 US 42 (1970).

Even accepting the validity of the exigent circumstances for the purposes of argument, the agents could quite easily have staked out Becker's apartment thus allowing them to obtain a warrant: Note, Scope Limitations for

Searches Incident to Arrest, 78 *Yale L J* 433, 445-446 (1969). As the Honorable J. Shelly Wright pointed out in dissenting from the validation of the warrantless arrest entry in *Dorman* v *United States, supra,* at 402-403 (1970):

> "The police, while waiting for a judicial officer to authorize entry into the home, could simply have staked out the apartment. In fact, while the group of officers entered, others did cover the exits to the building and apartment. The police could have remained outside the apartment until a warrant was obtained. If Dorman was in the apartment and left it, the police could have arrested him then. The difference in approach is not slight. Had the police followed this procedure, Mrs. Dorman and her friend might have been spared the shame, shock and embarassment of the nightime shotgun-bearing entrance of half a dozen policemen into their home. Further, the insensitive action of the group remaining inside the home through most of the night might have been avoided. This is so because, even if the magistrate or judge had decided that provable cause existed to issue a warrant, he might have put reasonable limits on its execution—for example, he might have limited the entry of a home in its execution to daytime, or he might have made explicit that the warrant was good only to search for Dorman and that it was not a license to remain indefinitely in the apartment."

By the officers' own testmony they had the names and telephone numbers of United States Magistrates and District Judges, yet they made no attempt whatsoever to obtain a warrant; in fact, as Officer McKinion stated, never since he has been in Detroit has he used these numbers, and this is exactly the problem. For the Court to validate this arrest entry and subsequent search would be to encourage law enforcement officials to avoid the warrant re-

quirement in a way repugnant to the Fourth Amendment. As Mr. Justice Douglas pointed out in *McDonald* v *United States*, 335 US 451, 455-456 (1948):

> "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home."

III

APPELLANT'S RIGHTS UNDER THE FOURTH AMENDMENT WERE FURTHER VIOLATED BY THE FORCIBLE, NIGHT TIME ENTRY OF HIS HOME, ABSENT EXIGENT CIRCUMSTANCES.

Appellant contends that if exigent circumstances are required to make a warrantless arrest entry of a citizen's home, then a fortiorari, an even higher degree of exigency, is required where that entry is forcible:

> " 'The right to break open a door to make an arrest requires something more than the mere right to arrest.' The government concedes that even when officers have a warrant of arrest they may not break open doors unless there is some degree of necessity. To execute the warrant for McKnight's arrest there was no necessity to break open doors; or, what comes to the same thing for legal purposes, none but what the officers themselves create . . . Since McKnight's arrest was accomplished by a needless and violent invasion of a private house, it was illegal, particularly since the real purpose of the invasion was not an arrest but a

search." *McKnight* v *United States,* 183 F2d 977, 1978 (DC Cir, 1950).

Judge Prettyman, after an intensive and scholarly survey of the early common law, concluded in *Accarino* v *United States,* 179 F2d 456, 464 (DC Cir 1949):

> "It seems to us clear that from the early days of the common law the breaking of doors to make an arrest without a warrant was lawful only if necessary. Indeed, there was grave doubt among the great authorities that an officer had any power to break doors without a warrant. Care should be taken nowadays that expressions of opinion by those early writers in support of the existence of the power are not misconstrued as assertions of an unqualified power. A man in his own home has a right of privacy which he does not have when on the public street. That additional right imposes additional requirements upon the power of arrest."

In 1958, this Honorable Court spoke to this issue in *Miller* v *United States,* 357 US 301, 306-307, saying:

> "From the earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest. Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle.
>
> "But the common law recognized some authority in law officers to break the door of a dwelling to arrest for felony. The common-law authorities differ, however, as to the circumstances in which this was the case."

Appellant maintains that police do not, therefore, have an absolute right to make a forcible entry, especially a forcible entry of a man's home late at night, to make an arrest even with probable cause. There must be some ascertain-

able necessity requiring such an offensive invasion of an individual's privacy.

The government relies on 18 USC 3109 for justification of the forcible entry:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

But, 18 USC 3109, being a codification of the common law, is subject to this same requirement of necessity before he "may" break into a dwelling. As appellant pointed out in the previous section, there existed no legitimate necessity for the forcible entry of his home.

Further, § 3109 incorporates two other requirements which were not met by the officers in the instant fact situation.

A

The Federal Agents Did Not Have Reason to Believe That Appellant Was in His Home.

Officers must have reasonable cause to believe that the person sought to be arrested is, in fact, in the residence. *United States* v *Watson*, 307 F Supp 173 (1969). *Watson* was a search with an arrest warrant, but the Court there said:

> "An officer seeking entry in order to effect an arrest cannot accomplish his task if the person he is looking for is not inside. Consequently, absent consent, the officer cannot enter by any means, breaking or otherwise, unless he has reasonable

cause to believe the defendant is within [citations omitted].

"An arrest warrant is issued solely upon a finding of probable cause to believe that a crime was committed and that the defendant committed it. The magistrate does not, in addition, determine that there is probable cause to believe the defendant can be found at a particular place. Accordingly, an arrest warrant does not give the police power to enter an individual's home unless they have reasonable cause to believe it is occupied.

"The question before the Court, then, in the first instance is whether the detective had reasonable cause to believe the defendant is within [citations ment. If he did have reasonable cause to believe the defendant was inside, the Court must then determine whether he had been refused entry within the meaning of Section 3109, so that entry *by breaking* was justified.

"It is not necessary to reach the latter question, for the Court concludes that, on the basis of the known facts, the detective did not have reasonable cause to believe that the defendant was in the house or, indeed, that the house was occupied by anyone. When the detective knocked on the door, the only positive indication that someone might have been inside was the noise from the radio. He did not hear sounds of any other activity. Likewise the owner received no response when he knocked on the door a few minutes earlier. Indeed, neither man observed any activity or persons inside, although they were present for several minutes beofre they went in through the rear door. Furthermore, although a telephone call to defendant's number indicated a 'busy' signal, that information had little probative value at the time entry was effected. In these circumstances, the Court is unable to find that the detective had reasonable cause to believe the defendant was at home." *Id* at 175-176.

The Agents Were Not Refused Entry by the Appellant.

As *Watson* suggests, even if this Honorable Court were to find that the federal agents had reasonable cause to believe Larry Becker was in the house, they must be *refused* entry before they may break in. This requirement is specifically included in the language of § 3109.

Watson further points out that no response does not by itself constitute a refusal. And while refusal is not limited to affirmative denials, *United States* v *Harris,* 391 F2d 384 (6th Cir, 1968), and may therefore be implied from certain circumstances, the officers must be able to point to *some* concrete evidence of refusal. A review of the applicable reported cases in this circuit reveals this. *United States* v *Alexander,* 346 F2d 561 (6th Cir, 1965 [man answers the door, pulls shade, sound of retreating footsteps]; *United States* v *Chambers,* 382 F2d 910 (6th Cir, 1967) [person coming to door, pulling shade and drawing back]; *United States* v *Harris,* 391 F2d 384 (6th Cir, 1968) [officers knock, hear activity, then silence].

Other circuits have also made the same requirement. *United States* v *Augello,* 368 F2d 692 (1966) [officers knock and see defendant's sister run away from the door calling his name]; *United States* v *Pratter,* 465 F2d 227 (7th Cir, 1972) [officers did not await refusal, risk of drug destruction did not justify noncompliance with requirement of refusal]; *McClure* v *United States,* 332 F2d 19 (9th Cir, 1964) [officers observed mother of defendant begin to run and upon their knock heard footsteps going away]; *Stamps* v *United States,* 436 F2d 1059 (9th Cir, 1971) [officers heard commotion, then footsteps running away].

The Ninth Circuit in *Meyer* v *United States*, 386 F2d 715, 718 (1967), a case of non-announcement rather than refusal, indicated that:

> "Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard—the requirement of particularity—would be lost. Just as the police must have sufficiency particular reason to enter at all, so must they have some particular reason to enter in the manner chosen."

Law of the District of Columbia Circuit obviously is crucial on the whole area of forcible, warrantless entry to arrest, and on the point of refusal, they too require some specific showing of refusal. *United States* v *Wylie*, 462 F2d 1178 (1972) [police in hot pursuit followed trail marked by eyewitness, then knocked and shouted for five minutes;] *United States* v *Harris*, 435 F2d 74 (1970) [officers heard furniture moving, spotted evidence, were greeted in a furtive manner]; *Kleinburt* v *United States*, 439 F 2d 511 (1970) [officers heard occupants barricading door].

In *Watson, supra*, at 176, the District of Columbia Circuit said:

> "Since this is so, it follows that the detective was not 'refused admittance' within the meaning of Section 3109. Moreover, even if there had been reasonable cause to believe that the defendant was inside, it is questionable that the circumstances here were sufficient to amount to a refusal of entry."

Appellant maintains that other than the initial phone call nearly three hours prior, the Record reflects no reason for the agents to believe that defendant was, in fact, in his apartment and no basis to conclude that they had been refused admittance. Therefore, their entry, the subsequent arrest and search were all illegal.

IV

FEDERAL AGENTS DID NOT HAVE PROBABLE CAUSE TO BELIEVE THAT APPELLANT HAD COMMITTED A CRIME.

Appellant contends that the agents did not have probable cause to arrest him for any crime. Probable cause for arrest has been defined as "evidence which would warrant a man of reasonable caution in the belief that a felony had been committed". *Wong Sun* v *United States*, 371 US 471, 479 (1963). The standard is objective, not subjective. *Worthington* v *United States*, 166 F2d 557, 564 (6th Cir, 1948). Such terms as "reasonable grounds" are the substantial equivalent to the term "probable cause." *Draper* v *United States*, 358 US 307 (1959).

It is clear that neither mere suspicion *(Wong Sun, supra,* at 479) nor even "strong reason to suspect" *(Henry* v *United States*, 361 US 98 (1959)) are adequate.

Further, the standards for warrantless police action are at least as high as for action with a warrant *(Whitley* v *Warden of Wyoming State Penitentiary*, 401 US 560 (1971)), if not higher *(United States* v *Ventresca* 380 US 102 (1965) than for arrest without a warrant.

The diversity of decisions on probable cause seems to to defy easy categorization and really requires a precise factual analysis of each case. This is especially true of the facts of this case, because they are somewhat unique.

The agents testified that their probable cause determination arose entirely out of the fact that Joseph Jacobini contacted a certain telephone number, talked to a person named "Larry" to arrange for the purchase of more narcotics and that this number was traced to appellant Larry Becker.

First, the method by which the number was obtained was inherently unreliable. Agent Stepp allegedly memorized the number under the tense conditions of acting as an undercover agent and then transferred it orally to another agent only after the intervening events of the arrest and detention of Jacobini and McManus. The inherent unreliability of this is well illustrated by the fact that at the suppression hearing, Agent Stepp could not even remember whether Jacobini had originally dialed manually for the number or gone through the operator.

Second, the agents themselves neither saw nor heard nor were they informed by anyone that Larry Becker had done anything. They had never heard his name before that night (T. #1, 45, 61). They did not know that anyone was on the other end of the line with Jacobini; that if there was, who it was; or if it was Larry Becker that he in fact said anything to Joseph Jacobini that was criminally punishable. The only crime committed to the best of Agent Stepp's knowledge was by Joseph Jacobini.

Third, the agents had absolutely no information other than the phone call to corroborate their suspicions in regard to Larry Becker. Jacobini, even after he was arrested, did not implicate Larry Becker in any way (T.#1, 55, 56). The officers made no personal observations of him. They, in fact, did not even know if he was at home (T.#1, 65) or what he looked like (T.#1, 17, 66, 67).

Of the cases that appellant could uncover involving roughly the same fact situation, at least initially, i.e., a phone number and a name, the officers involved ultimately obtained more information before arrest. See, e.g., *United States* v *Figueroa,* 204 F Supp 641 (DC NY, 1962), aff'd 323 F2d 729 (2nd Cir) *cert den* 376 US 955.

Of special interest is *United States* v *Pierce,* 124 F Supp 264 (ND Ohio, 1954); aff'd 224 F2d 281 on opinion below. There officers arrested informer and found on his person a name and telephone number. Informer told the officers that he had purchased heroin from this person and then allowed agents to listen in on a phone conversation while he arranged a buy. Officers arrested Pierce only after he showed up as planned, fit perfectly the description by the informant and was pointed out by the informant.

Of special interest is *United States* v *Pierce,* 124 F Supp (1948). In that case an officer was informed by X that he was going to buy counterfeit ration coupons from Y. The officer followed Y and observed him enter the defendant's car. The officer went to the vehicle and found X on the back seat holding two counterfeit ration coupons. The defendant was seated by Y on the front seat. X told the officer he had received the coupons from Y. All three were taken into custody. The officer had no warrant for arrest. At the police station, the defendant was ordered to place the contents of his pockets on a table. This revealed two gasoline and several fuel oil ration coupons. Two hours later the defendant was booked and thoroughly searched, at which time 100 gasoline coupons were found. All turned out to be counterfeit. The defendant was convicted or knowingly possessing counterfeit gasoline cou pons, a misdemeanor. He contended on appeal that there was no probable cause for the arrest. The government con-

tended that there were grounds for arrest for the felony of conspiracy. The Court noted that the only crime committed in the officer's presence was by Y, the informant, who was observed in possession of the coupons. As to Y, the officer had previous information that would appear to be corroborated by what he had observed. But there was no information about the defendant, nor could his presence in itself give rise to probable cause to arrest for the illegal possession of the coupons. The question then became whether there was probable cause to arrest the defendant on a charge of conspiracy, to which, again, the Court responded in the negative saying that his mere presence was not necessarily criminal nor certainly did it indicate the requisite intent or knowledge.

Appellant maintains that the government here cannot even point to his presence, only to the suspicion that he was on the other end of a phone conversation.

A review of the cases on probable cause to arrest for narcotics violations leads appellant to believe that validation of the instant arrest as based on sufficient probable cause would bring the probable cause standard to a new low.

Incredibly, the Sixth Circuit Court of Appeals did not consider whether sufficient grounds existed to support the District Court's finding that probable cause existed for the warrantless arrest of Becker; the Court merely observed that the records, "contain evidence which supports the finding of the District Judge that there was no prior opportunity under the circumstances of this case for the officers to obtain an arrest warrant . . . "

Apparently, the Court felt that, in cases where it would be difficult to obtain a warrant, a finding of probable cause may be inferred from the results. This is totally

inadequate. As Judge McCree observed, ". . . it was not established that there was anyone at the other end of Jacobini's telephone conversation . . . " "These issues are substantial and should be considered if the conviction is to be affirmed." *Supra,* at 8, 15. (A-48, 57)

V

APPELLANT'S ARREST WAS MERELY A PRETEXT FOR A SEARCH FOR TANGIBLE EVIDENCE.

It is clear that an arrest may not be used as a pretext for a search and that if it is, this alone is sufficient to suppress the evidence obtained. *Worthington* v *United States,* 166 F2d 557 (6th Cir, 1948); *United States* v *Harris,* 321 F2d 739 (6 Cir, 1963); *United States* v *James,* 378 F2d 88 (6th Cir, 1967).

While above-cited cases obviously involve some differing facts and circumstances from the case at bar, this does not vitiate the general principle nor does it negate the importance of the Fourth Amendment rights involved. The Court must look at this particular factor situation and appellant believes it is clear that:

> "Taking into account all of the admitted facts and circumstances of the case, including the large aggregation of agents and police officers, it seems to us that the agents and officers were interested in something more than merely making an arrest. It is clear that their primary purpose was to make a general exploratory search of the apartment, with the hope of finding narcotics." *James, supra* at 90.

Appellant asks the Court to consider that the agents' probable cause, taken in its best light, was weak; that they made no attempt whatsoever to obtain a warrant al-

though they had the resources to do so; that there were between eight and ten agents involved; that they made a farcible entry of a private residence late at night; that they fanned out through all parts of the home; that a search incident to arrest was made even though Larry Becker was clearly no longer a threat to the agents; that a general search was made involving the seizure of numerous articles in no way related to the alleged charge; that the agents spent one-half hour in Larry Becker's apartment upon his arrest.

Some elaboration of the points not dealt with elsewhere is necessary. Though most of the officers indicated by their testimony they went to Larry Becker's residence to arrest him, the Court is not bound to accept this. As this Court said in *Harris, supra,* at 741.

> "All of the agents of the Narcotics Bureau who testified said that they went out to the defendant's apartment for the purpose of arresting him for violating the narcotics laws. The real purpose of the agents must be determined from all of the facts and circumstances surrounding the arrest of the defendant and the search for his apartment. The court is not bound to accept the purpose as stated by the agents as controlling."

It should also be noted that at least one agent, significantly enough, the first one to take the stand, thought the party was going to Larry Becker's residence for a reason other than arrest: "There are supposed to be 30,000 hits theer and we're going out there to find out.

In addition to the LSD pills found and seized from the bureau, the agents fanned out through the house, and in the course of one-half hour indiscriminately seized a number of items from appellant's second floor bedroom and his roommate's bedroom. These seizures included items

that could in no way be related to the alleged crime (composite nude picture). Appellant maintains that this illustrates the real intent of the agents and directs the Court to the Honorable Wade H. McCree's dissent in *Giacalone* v *Lucas,* 445 F2d 1238, 1255 (6th Cir, 1971):

> "The majority opinion adopts the conclusion of the trial judge who found that the weapons • • • were seized quite early in the law enforcement enterprise as the direct product of a lawful good faith arrest and limited search, incident thereto. This determination is supportable only by segmenting this law enforcement enterprise into discrete episodes—an approach which is without support in law and distorts reality."

The fact that the officers felt that time was of the essence, and that they were no doubt aware that "successful prosecution was virtually impossible without physical evidence" explains but does not excuse their actions. *Harris, supra,* at 742.

In noting that the District Court's "finding that the primary purpose of entry into Becker's home at the time of his arrest was not a ruse to permit an exploratory search of the premises is clearly erroneous," Judge McCree eloquently observed:

> "It is inescapable that the primary purpose of the agents from the beginning was not to effect an arrest but to conduct a general exploratory search that had not been authorized by a warrant." *Supra,* at 13. (A-54)

The totality of the facts and circumstances in the instant case makes it clear that the agents were attempting to achieve that which they could not have done legally by means of an illegal pretext arrest. Appellant urges that this Honorable Court not condone activity intended to sidestep inalienable Constitutional rights.

CONCLUSION AND RELIEF SOUGHT

Wherefore, by reason of the foregoing, Petitioner prays that this Court issue a Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

A. OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS

No. 73-1208

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,
v.
Lawrence F. Becker,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 5, 1973.

Before: Weick, McCree and Lively, Circuit Judges .

Lively, Circuit Judge. This appeal is from a conviction for violation of 21 U,S.C. § 841(a)(1), possession of controlled substances with intent to distribute or dispense. Appellant waived trial by jury and the case was tried before the Court with the same judge presiding who conducted the hearing on a motion to suppress evidence. On appeal it is claimed that evidence consisting of 1,000 L.S.D. tablets was illegally seized and should have been suppressed by the district judge.

A recital of the facts is necessary. An undercover agent purchased a quantity of mescaline at a motel in Detroit at approximately 10:00 p.m. on March 3, 1972. He told the seller that he would be interested in purchasing more drugs, and memorized the telephone number given to the motel operator as the seller contacted his "man." The seller was heard to say to someone he called "Larry" that he needed 30,000 more "hits" of mescaline and would be over in 30 minutes to pick it up. The seller described "Larry" as the number two man in Detroit for mescaline.

Shortly thereafter narcotics agents arrested everyone in the motel room where the sale had taken place. The undercover agent passed the telephone number to the arresting officers who verified it with the motel operator. By the time the location and name of the subscriber to the telephone number had been ascertained it was about 11:30 p.m. Based on information received from the telephone company a group of approximately eight agents went to appellant's residence in Oak Park, Michigan, arriving shortly after midnight. After knocking on the door and identifying themselves, *the agents forcibly entered Becker's apartment.*

Appellant was sitting on a couch in the living-dining room area of his apartment watching television. *He was directed to stand next to a wall with his hands up against it.* This location was approximately 12 feet from the corner of the couch where Becker was first seen, and was the nearest wall space free of furniture or openings. *The arresting agent testified that he had no handcuffs and finally secured Becker with a belt. He stated that appellant kept turning around and "wasn't being real cooperative."* Some four or five minutes elapsed before the prisoner was secured. Another agent who was in the same room said that

Becker refused to follow orders—that he continued to turn around, kept his hands down instead of up and was constantly moving in a direction other than where he was told to remain. He described appellant's conduct as "resisting" and said it was almost five minutes before the resistence ended.

There was a *desk-type table three to five feet from where appellant was standing and the L.S.D. tablets were found* in one of its drawers which had been *closed.* The agent who discovered the drugs stated, "There was a time when I secured the chest to make sure there were no weapons." He said that when Becker had been subdued the other agent searched the prisoner while he checked the surrounding area for weapons. This witness testified that he had put his gun away before he began his search for weapons and that he *was "no longer threatened by the situation."* However, since Becker had not been tied with the belt at that time, he considered that there was "still a potential danger." *It was admitted that Becker never tried to use physical force on any agent.* In response to a question by Judge Kennety the agent who subdued Becker stated that he was searching him when the pills were found and that he did not believe he had put the belt on appellant's arms at that time. The agents stayed in the house for approximately 30 minutes and a general search of the premises was conducted.

The agents who arrested appellant and seized the tablets and other items in his home had neither a search warrant nor a warrant for his arrest. It was testified that the purpose in entering the premises of Becker was to arrest him and there was no advance discussion about a search. Before entering the house, each agent was assigned an area of the premises with responsibility for making sure that

no other persons were present and to look for weapons within reach. *Appellant testified that from the time the agents entered there was a great deal of noise from all parts of the apartment which indicated that a search was being conducted. He said he kept turning from the wall to try to see what was going on.* The agent in charge stated that it would have taken too much time to obtain an arrest warrant at midnight in view of the fact that the seller had informed Becker over the telephone that he would pick up the order of drugs in about 30 minutes. From the telephone conversation the agents believed a crime was being committed by "Larry," the person who agreed to furnish drugs, and that probable cause existed for an arrest.

The foregoing evidence was developed on a motion to suppress all evidence seized in Becker's apartment. The District Court made the following findings: (1) The officers announced their presence and purpose a reasonable time before entering the premises. (2) *The search of the chest three to five feet from the appellant was permitted as a search of the immediate area incident to arrest. Such a search could include closed drawers into which Becker could reach for either a weapon or evidence which he might be able to destroy.* (3) Items seized in other parts of the house resulted from a general search which was not permissible. All evidence taken from other areas of the apartment was suppressed. (4) There was no prior opportunity to secure an arrest warrant, but probable cause did exist for the arrest of Becker. (5) The purpose of the officers going to Becker's residence was to arrest him, and his arrest was not a ruse to search the premises.

Appellant maintains that his Fourth Amendment rights were violated by both the forcible entry and arrest with-

out a warrant and the warrantless search of his home and seizure of his property. The record contains evidence which supports the finding of the district judge that there was no prior opportunity under the circumstances of this case for the officers to obtain an arrest warrant in view of the indication from the motel that the drugs would be picked up in about 30 minutes and the fact that it took longer than that just to determine the location and identity of the subscriber to the telephone with which the seller was connected. The finding that identification and purpose were announced a reasonable time before entry was made into appellant's premises is likewise supported by the evidence.

While the finding that the officers had as their purpose the arrest of Becker, and that the arrest was not a mere ruse to conduct a search is not clearly erroneous, this matter deserves comment. *The Constitution contemplates that searches will be made upon the basis of a prior determination of necessity by a disinterested magistrate.* ***McDonald*** v. *United States,* 335 U.S. 451, 455 (1958). *The warrantless search remains the exception which must be justified. Where the justification relied upon is that the search is a necessary incident to a lawful arrest the restricted scope of this exception must be observed.* This is especially true where the search is conducted in a person's home at night. Such warrants issued pursuant to Rule 41, Fed. R. Crim. P. are subject to the following limitation:

> The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. Fed. R. Crim. P. Rule 41(c).

Since a nighttime search with a warrant requires more positive information than one conducted in the daytime, the Courts should be alert to prevent evasion of this requirement by resort to warrantless nighttime searches incident to arrest where the real purpose is a search and the arrest is only a pretext.

In *Chimel* v. *California*, 395 U.S. 752 (1969), the Supreme Court analyzed the extent of the "search incident to arrest" principle as follows:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. *And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.* A gun on a table or in a drawer in front of one who is arrested can be as dangeous to the arresting officer as one concealed in the clothing of the person arrested. *There is ample justification, therefore, for the search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.*
>
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—*or, for that matter, for searching*

> *through all the desk drawers or other closed or concealed areas in that room itself.* Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less. *Id., at* 762-763.

We must test the search of a closed drawer in the desk or table which was located three to five feet from appellant by these criteria. The question to be answered is whether, under the circumstances described by the witnesses, the closed drawer was in the area "from within which he might gain possession of a weapon or destructible evidence." *Id.*, at 763.

In *United States v. Shye*, 473 F.2d 1061 (6th Cir. 1973), we held that the District Court properly suppressed evidence consisting of a sack of money found between a water heater and an adjoining wall about four feet from where a suspect was positioned against a wall for search. There was a hallway between the suspect and the water heater which was in a closet-like depression in the wall. Furthermore, a policeman stood between this closet and the nearest defendant. All suspects were lined up against a wall and "the officers had the situation completely under control." *Id.* at 1063. Under these circumstances the District Court properly held that the sack of money was not within the immediate control of the suspects.

In the present case, the situation was not completely under control, since the appellant was still resisting and trying to move in directions other than those prescribed by the officers. He had not been handcuffed or bound when the pills were discovered and the officer who opened the drawer stated that his purpose was to secure the desk to

make sure there were no weapons. *Insofar as the record discloses no officer was positioned between appellant and the desk until Officer Mahon moved to the desk to look for weapons.* Each case which applies the *Chimel* rule must be decided on its own facts. The facts *distinguish* this case from *United States* v *Shye, supra,* and support the finding of the District Court that the evidence in question was the product of a search in the immediate area under the control of appellant at the time of his arrest.

The judgment of the District Court is affirmed.

B. DISSENTING OPINION OF THE HONORABLE WADE McCREE, CIRCUIT JUDGE

McCree, Circuit Judge (dissenting). I respectfully dissent for two reasons, either of which requires the suppression of the evidence seized in Becker's apartment.

In the first instance, the district court's finding that the primary purpose of the entry into Becker's home at the time of his arrest was not a ruse to permit an exploratory search of the premises is clearly erroneous. The majority opinion characterizes this determination as a finding not clearly erroneous but acknowledgs that it deserves comment. The district court justified the holding on the ground that "[i]t was imperative that the arrest be made as quickly as possible if the identity of the party at the other end of JACOBONI'S telephone conversation was to ever be established with sufficient certainty." *Apart from the fact that it was not established that there was anyone at the other end of Jacoboni's telephone conversation, the district court's reason indicates the heuristic nature of the enterprise.*

Although the finding is fully supported by the testimony of agent Finnegan, the last witness at the suppression hearing who testified on June 28, 1972, *it is contradicted by the testimony of the other agents who testified earlier on May 22 and whose testimony is not expressly discredited by the district court.*[1] *Also, the organization and deployment of the raiding party betrays the true nature and purpose of the expedition.*

Special agent Herbert Ray, who was designated as custodian of any seized evidence, upon being asked whether there was any discussion "as to how the search was to be conducted," replied, "When I got there my senior partner told me we're going out to the address that Stepp found out about in the conversation—there are supposed to be 30,000 hits there and we're going there to find out. That's what I was told when I got in."

The line of questioning continued, "You were going out there to find out?" He replied, "Yes." The district court did not comment on this admission or explain why it was ignored or discredited.

But more fundamental to our inquiry is the manner in which the raid was organized. A party of 8 to 10 agents was dispatched to arrest the person in whose name the telephone at the number Jacoboni called was registered. The address was an apartment in one of Detroit's northern suburbs. After a meeting in the Federal Building in downtown Detroit where various duties were assigned by Special Agent McKinnon, the agents, in four vehicles, rendezvoused at a gas station near Becker's home where

[1] It appears that the other agents were excluded from the courtroom until their testimony was given but agent Finnegan had an opportunity to know what had been stated a month before he was required to give his version of events.

an additional 10 or 15 minutes were devoted to last minute preparations. Despite agent Finnegan's denial that there was to be a search (in contradiction of agent Ray's testimony a month earlier), an advance party was sent to scout the area and agents were stationed at the front and rear doors of the house. *Agent Ray was assigned to cover the back door and, instead of being instructed merely to secure it so that no one could escape, he was told* ". . . to *enter when he got the word from the people that had gone in the front door.*" Ray testified that after entering the apartment, he remained about 25 to 30 minutes and "[l]ooked around, looked in closets, looked behind doors, looked between those blankets around the bed and talked with other agents. I talked with Mr. Becker a few minutes." *He admitted that he removed books from shelves and saw a table overturned.* Indicative of the honesty of his admission that the purpose of the sorties was to effect a search was his volunteered statement when he acknowledged that he went upstairs, "I always manager to get around the rooms when I go in on an arrest."

More significant is agent Rays' statement that he had been on the premises *5 to 8 minutes before the L.S.D. was seized* (agent Mahon estimated the interval as between 5 and 15 minutes). If the sole purpose of the entry was to arrest *Becker, the agents could have removed him from the house and they would have been miles away on the journey back to the Federal Building before this seizure. Becker could just as easily have been escorted out the door when agent Finnegan "grabbed him by the arm and directed him over to the wall to put his hands up against the wall to be patted down and searched for any weapons." This maneuver positioned Becker spread-eagled against the kitchen wall and Finnegan searched him and found no weapons. The officers were so sufficiently satisfied that*

Becker was secured that they put away their firearms and fanned out throughout the house in what can only be characterized as a general search. Small wonder that Becker kept turning around to inquire whether the officers had a warrant. To seize on his constitutional query as evidence that he had not been secured in order to justify the search of the closed drawer of the desk 3 to 5 feet away placed Becker in an impossible dilemma. Unless he submitted to the unconstitutional search of his house, he invited the finding that he was endangering the officers and thereby justified the search the validity of which he sought to ascertain.

Chief Judge Cecil spoke for this court about arrests used as pretexts for searches in *United States* v. *Harris*, 321 F.2d 739 (1963):

> An arrest may not be used as a pretext or subterfuge for making a search of premises without a search warrant where ordinarily one would be required under the Fourth Amendment. If, in fact, the primary purpose of forcibly entering a person's home is to search for evidence with which to convict him of crime, the evidence so obtained is not admissible in court. United States v. Lefkewitz, 285 U.S. 452, 467, 52 S.Ct. 420, 76 L.Ed. 877; Harris v. United States, 331 U.S. 145, 153, 67 S.Ct. 1098, 91 L.Ed. 1399; Abel v. United States, 362 U.S. 217, 225-226, 80 S.Ct. 683, 4 L.Ed.2d 668; Jones v. United States, 357 U.S. 493, 500, 78 S.Ct. 1253, 2 L.Ed.2d 1514; Worthington v. United States, 166 F.2d 557, 566, C.A. 6; Taglavore v. United States, 291 F.2d 262, 265, C.A.9. See also Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; Henderson v. United States 12 F.2d 528, C.A. 4; Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 1635, 10 L.Ed.2d 726 (footnote omitted).

In *Harris,* a case with strikingly similar aspects, we made it clear that the total circumstances must be considered in determining the real purpose of the officers.

> All of the agents of the Narcotics Bureau who testified said that they went out to the defendant's apartment for the purpose of arresting him for violating the narcotics laws. The real purpose of the agents must be determined from all of the facts and circumstances surrounding the arrest of the defendant and the search of the apartment. The court is not bound to accept the purpose as stated by the agents as controlling.
>
> . . .
>
> The manner of placing the agents at the entrances and the way Mr. DeBiasi signalled the men at the bedroom door to enter as he gained entrance and knew the defendant was just inside the door is inconsistent with a primary purpose of arrest. If arrest had been the primary purpose of the agents in going to the apartment, there would have been no necessity for the three agents to forcibly enter the bedroom door. If they had been placed there to prevent the defendant's escape through that door, certainly they could have caught him on the way out.

Id at 741-742.

Of course, *Harris* was a case in which the trial judge had made a finding that the arrest of the defendant was but a pretext for a search, and here the trial judge found to the contrary. Nevertheless, that decision is instructive of the elements of an arrest used as a pretext for a search and it is apparent that the district court here did not consider them.

We have assumed in the past that the clearly erroneous standard of review applies to findings in a criminal case by a district judge considering motions to suppress evidence, *United States* v. *Rose,* 415 F.2d 742 (6th Cir. 1969), (6th Cir. 1969), *cert denied,* 396 U.S. 971 (1970), and in *United States v. Breen,* 419 F.2d 806 (6th Cir. 1969), we expressly stated that Fed. R. Civ. P. 52(a) sets forth the standard of review. *See also,* 2 C. Wright, *Federal Practice and Procedure: Criminal* § 375. We need not decide here the applicability of this standard because it is clear that the district judge merely accepted the testimony of one of the government agents, disregarded without explanation the conflicting testimony of the others, and did not consider at all the undisputed evidence of the physical disposition and assignment of the several agents as *Harris, supra,* requires. Accordingly, we are not bound to accept the findings of the district judge, as Chief Justice Hastings, dissenting in *United States* v. *Ziemer,* 291 F.2d 100, 103 (7th Cir.), *cert. denied,* 368 U.S. 877 (1961), explained:

> The issue is whether the Government's evidence, taken at its full value, is sufficient to support the constitutional and legal conclusion that defendant consented to a search. Mr. Justice Frankfurter, dissenting in Davis v. United States, 1946, 328 U.S. 582, 599, 66 S.Ct. 1256, 1264, 90 L.Ed. 1453, noted:
>
> "The district court's finding that Davis voluntarily surrendered the documents is not one of those findings of facts which appropriately calls for our acceptance. When such a finding involves conflicting evidence or the credibility of a witness, the advantage of having seen or heard a witness may be decisive. But here the issue is not as to what took place but as to the significance of what took place.

> And when a district court's finding of a so-called fact is as interwoven as it is here with constitutional consequences, we cannot accept a finding whereby the constitutional issues predetermined. We are not bound by findings that operate as cryptic constitutional determinations . . .."

The district court suppressed the items seized on the second floor although the search had commenced there before the L.S.D. tablets were found in the living room desk drawer . This conclusion, with which I agree, also required suppression of the tablets taken from the living room in the absence of a finding disassociating the purpose of the agents in the living room who reduced Becker to custody from that of the agents who went upstairs and unlawfully searched the closets and the bed clothes. The coordinated nature of the enterprise precludes such a finding and none was made. It is inescapable that the primary purpose of the agents from the beginning was not to effect an arrest but to conduct a general exploratory search that had not been authorizd by a warrant. See *Giacolone* v. *Lucas*, 445 F.2d 1238, 1255-58, (6th Cir. 1971) (McCree, J., dissenting).

But even if the primary purpose of the officers was not to conduct a search but to effect the arrest, the search was unconstitutionally impermissible. In *Chimel* v. *California*, 395 U.S. 752 (1969), the Court emphasized that warrantless searches, whether or not incident to arrest, were the exception, not the rule, and that only the exigencies of preventing harm to the arresting officers, the escape of suspects, or the destruction of evidence justified search of the arrestee's person and the area within his immediate control. In *United States* v. *Shye*, 473 F.2d 1061, 1066 (6th Cir. 1973), we observed that only the existence of circum-

stances at which this limited exception was aimed determined the propriety of invoking it.

In this appeal, Becker had been searched and disarmed, and the officers felt sufficiently secure to put away their weapons. There were 8 to 10 armed agents in the house. Becker's only activity after their entry was to turn away from the wall to inquire about the existence of a search warrant.

Agent Ray testified that when he first saw Becker (about 5 minutes before the L.S.D. was found), "He was secured. There were agents with him and I thought safe at that point." He testified that none of the other agents had his sidearm drawn when he went in and that he put his away. He concluded his direct testimony by reiterating his statement that Becker had been secured when he entered.

Agent Mahon, the other agent to testify at the May 22 hearing of the motion to suppress, found the L.S.D. in the desk drawer. He testified that Becker was "neutralized" within a half minute after he had been moved to the wall where he was searched. He testified, "I would think after a while once it was finally determined there was no threat of physical harm, the weapons were put away." Upon being asked by the assistant United States Attorney what he meant by "subdued", Mahon replied, "What I mean is he was no longer in a violent nature or position to pull a gun or anything." Mahon's testimony makes it clear that he no longer apprehended any danger when he searched the chest:

> Q. When was it that you located something in a chest, a chest drawer in time relation to which he was finally subdued and the belt was on and he was searched?

A. As soon as I was reasonably sure that there was no need for my immediate attention to make sure he wasn't going to be striking out, and I think it was more or less simultaneous upon his being searched that I checked the surrounding area for weapons.

The two officers who testified when the hearing resumed on June 2 added little except to observe that Becker's arms had not yet been bound by a belt at the time the search of the desk took place. The district court's finding that he "had not yet been patted down" is contrary to the testimony of all the officers who testified.

Applying *Chimel's* rationale to these facts, we must conclude that the opening of the desk drawer was impermissible. As the majority opinion quotes, *Chimel* makes a distinction between a gun on the table or in a drawer in front of one who is arrested and desk drawers and closed areas in the room in which the arrest is made.

Because I would reverse for either of the reasons stated, I find it unnecessary to consider whether probable cause existed for the arrest of a telephone subscriber when an officer overheard the dialing of his number by a criminal who stated into the transmitter that he would be over to pick up some narcotics. I also find it unnecessary to determine whether the forcible entry into a dwelling house in the night time to effect a warrantless arrest can be made in the absence of exigent circumstances and a showing of probable cause that the person to be arrested is at the entered address. I also find it unnecessary to determine whether the entry here was made so precipitously after the announcement of the presence of the officers and their purpose as to constitute non-compliance with the requirement in *Sabbath* v. *United States*, 391 U.S. 585 (1967)

that there must be a showing of refusal of admittance of the officer before a door may be forced. I mention these issues only to indicate that they are substantial and should be considered if the conviction is to be affirmed.

I recognize that this is a case where a search proved to be phenomenally productive. The prevention of the distribution of 1843 tablets of lysergic acid diethylamide (L.S.D.) is a fortunate occurrence for any community and the impulse to uphold the search and to congratulate the officers is difficult to resist. Nevertheless, however, fortuitously rewarding a search may prove to be, we cannot abandon our responsibility as guardians of the Grain and blink at the circumvention of constitutional limitations by overzealous police officers. I would reverse and remand with instructions to quash the search and to set aside the conviction.

C. OPINION AND ORDER DENYING MOTION TO SUPPRESS

Defendant Larry Becker has moved to suppress certain evidence seized from his premises located at 13680 Kenwood Street in the City of Oak Park, Michigan, on March 4, 1972, which he asserts was seized illegally and which the Government asserts was legally seized incident to a legal arrest. Defendant contends that the seizure was illegal on six bases.

The first basis is that the entry was illegal because the Federal officers failed to announce their presence or purposes prior to making a forced entry into the premises. Agent Gerald F. Finnigan, one of the officers who forced entry, testified at the evidentiary hearing on this motion

that he announced the agents' presence prior to entry and, further, that he had announced their purposes. His testimony was corroborated by that of agent McKinnon. Mr. Becker, in his own testimony, admitted that such announcement was made immediately preceding the entry of the officers. The Court finds as a matter of fact that the announcements occurred a reasonable time before entry. Mr. Becker was watching television and it may be that he did not hear the first announcement. In view of the hour he may even have been dozing.

Second, Mr. Becker claims that after placing him under arrest the agents conducted an "unbridled, general and exploratory search of the premises." Some of the items seized, such as the tablets from the drawer upstairs in a bedroom, were discovered as the result of a general search, and that evidence will be suppressed. However, the approximately 1000 LSD tablets found in a dresser or chest on the first floor in the living room-dining room area were found under other circumstances. The legality of their seizure is considered *infra*.

Third, Mr. Becker complains that the 1000 LSD tablets in the living-dining room area were taken from a closed drawer. It is true that this drawer was closed and was opened by agent Alexander T. Mahon; however, at the time that he opened it defendant Larry Becker was standing between three and five feet away from the chest and. although he had been asked to place his hands against the wall and face the wall, by agent Finnigan, he was continuing to turn around and to move about and had not yet been patted down or handcuffed. Thus, although he was not physically resisting arrest, yet neither had he submitted to arrest. Under these circumstances Agent Mahon under the doctrine of *Chimel* v *California*, 395 US 752

(1969), was entitled to search the immediate area incluing closed drawers into which defendant Becker coud reach for either a weapon or evidence which he might be able to destroy. The drawer was opened, by defendant Becker's own testimony, within five minutes after the agents had entered the house and, again, by Becker's own testimony, before Becker had been physically restrained. (Because of earlier arrests made just before the agents left to arrest Becker the agents had no handcuffs with them and defendant Backer's hands were secured by a belt.)

The fourth basis asserted by defendant is that the search of the premises wa made without the benefit of a search warrant although the officers did have time to procure one and *fifth* that the arrest of the defendant was without a warrant although there was time to procure an arrest warrant. The Government concedes that there was neither a search warrant nor arrest warrant in this case, but asserts that there was probable cause for the arrest and further that it was necessary to make a prompt arrest of defendant Becker. Becker's identity was unknown to the Federal agents until very shortly before his arrest. Earlier that same night an agent, acting undercover, had purchased a controlled substance from Joseph J. Jacobini, a co-defendant. The agent asked Jacobini if he could secure an additional quantity. Jacobini stated he would call his source and find out. Jacobini thereupon called a telephone number and spoke to someone called "Larry" after which he told the agents that his source could supply 30,000 more "hits." The telephone number was traced and the subscriber was found to be defendant Larry Becker at the Kenwood street apartment. The Court finds that the agents reasonably feared that Becker would be-

come suspicious if Jacobini did not arrive at Becker's place within a short period of time. It was about 11:30 p.m. before the location of and subscriber to the telephone were ascertained. Although the agents had the telephone numbers and addresses of the United States Magistrate and District Judges, it would have taken an appreciable length of time to secure an arrest warrant. There was no prior opportunity to secure an arrest warant, since, as found above, the agents were completely unaware of defendant Becker's existence until Jacobini's telephone call. These circumstances distinguish this case from *United States* v *Harris*, 321 F2d 739 (6th Cir. 1963), and *United States* v *James*, 378 F2d 88 (6th Cir. 1967) where agents could have arrested the defendants at any time but deliberately selected a time when they felt a productive search could be conducted.

Finally, defendant Becker claims that the primary purpose of the Federal agents entering defendant's home at the time of his arrest was to conduct an exploratory search of the premises and not to effectuate the arrest. At the evidentiary hearing the testimony of several of the agents who participated in the arrest was unanimous that the purpose of their going to Becker's residence was to arrest him. In the Court's opinion his arrest was not a ruse to search the premises. It was imperative that the arrest be made as quickly as possible if the identity of the party at the other end of Jacobini's telephone conversation was to ever be established with sufficient certainty. The portion of the search which was incident to his arrest was therefore valid and the Court will not suppress the approximately 1000 LSD tablets found in the chest in the living room in plastic baggies; because, however, the agents could and should have secured a search warrant for the

premises and could have done so even after the arrest of Becker and before the subsequent further search of the balance of the premises, the Court will suppress the items seized on the second floor.

IT IS SO ORDERED.

Cornelia G. Kennedy
United States Judge

Dated: August 11, 1972
Detroit, Michigan

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No. 73-824

In the Supreme Court of the United States

OCTOBER TERM, 1973

LAWRENCE F. BECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 485 F. 2d 51.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1973. On November 5, 1973, Mr. Justice Stewart granted an extension of time within which to file the petition for a writ of certiorari to and including November 26, 1973, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the arresting officers properly adhered to the standards of 18 U.S.C. 3109 in effecting a forced entry of petitioner's residence to arrest him.

2. Whether the warrantless nighttime arrest of petitioner in his home, based upon probable cause, was constitutionally permissible in view of the exigent circumstances with which the law enforcement officers were faced.

3. Whether the search, immediately following petitioner's arrest, of a drawer next to which he was standing was justified as a search incident to an arrest.

4. Whether the holding of the court of appeals—that the finding of the district court (that the entry into petitioner's premises was not a ruse to conduct a general search) was not clearly erroneous—warrants further review.

STATEMENT

After a jury-waived trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possession of a controlled substance (1,000 tablets of L.S.D.) with intent to distribute it in violation of 21 U.S.C. 841(a)(1). He was ordered committed for observation under 18 U.S.C. 4208(b).[1] The court of appeals affirmed, one judge dissenting (Pet. App. A).

On March 3, 1972, at 10:00 p.m., narcotics undercover agent James Stepp succeeded in purchasing some 15,000 dosage units of L.S.D. from one Jacoboni in a Detroit hotel room. The agent expressed an interest in purchasing another 30,000 units, whereupon Jacoboni placed a telephone call to an individual

[1] No further sentencing has yet occurred.

whom he referred to during the conversation as "Larry". Jacoboni stated to "Larry" that he wanted 30,000 more units and would arrive in thirty minutes to make the purchase. Jacoboni later indicated to Stepp that "Larry" was the source of the original 15,000 units and was the "number two man" in Detroit for such drug distribution (Tr. A. 44–57).[2] At this point Jacoboni was arrested.

Agent Stepp had memorized the telephone number given to the motel operator by Jacoboni, and other agents later confirmed it with the same operator. The agents hurriedly sought to trace the telephone number and by 11:30 p.m. discovered that it was registered in petitioner's name. Not wanting to arouse petitioner's suspicions, since Jacoboni had indicated he would arrive in thirty minutes, and fearing that "Larry" might make further large sales if not expeditiously apprehended, the agents proceeded to petitioner's residence to make an arrest, arriving there at about midnight; they did not first secure an arrest warrant (Tr. B. 40, 27).

Eight agents participated in the arrest. Two agents were sent to the rear of the apartment to prevent an escape, and the others approached the front door (Tr. A. 10–18). They knocked at petitioner's door and identified themselves; there being no response after a few moments, the agents pushed open the apartment door (Tr.A. 69–71; Tr.B. 8–9).

[2] "Tr.A." denotes the transcript of the May 22, 1972, hearing on the motion to suppress. "Tr.B." denotes the transcript of the second day of the hearing, on June 28, 1972.

Petitioner, who was sitting on a couch, was immediately directed by one agent to a nearby wall and told to place his hands against it. While not physically resisting, he was not cooperative and several times dropped his hands and attempted to turn around. After petitioner finally acceded to demands to stand against the wall, two agents searched his person and the area immediately around him, including a chest of drawers located within four feet of him. In the top drawer of the chest, approximately 1,000 L.S.D. tablets were discovered in a clear plastic bag (Tr. A. 74, 80, 91–95; Tr. B. 15). After this search, petitioner's arms were bound and he was taken to the Detroit federal building for arrest processing.[3]

ARGUMENT

1. Petitioner contends that the forcible entry into his residence to effect his arrest was invalid. It has been held that the validity of an entry to make a warrantless arrest is to be tested by criteria identical to those found in 18 U.S.C. 3109, dealing with entry to execute a search warrant. *Miller* v. *United States*, 357 U.S. 301, 306; *Sabbath* v. *United States*, 391 U.S. 585, 588. That section permits forcible entry when an officer is refused admittance after announcement of his

[3] Other agents examined the remaining rooms of the apartment. No other persons were found, although other quantities of drugs were discovered. These drugs, however, were found to be inadmissible by the district court. Even if that broader search was rightly found to have been unlawful, it would not invalidate prior lawful conduct. *United States* v. *Artieri*, C.A. 2, No. 73-1771, decided January 23, 1974.

authority and purpose.[4] Here, the district court specifically found that the officers had announced both their identity and their purpose and had waited a reasonable time thereafter before opening the door to petitioner's apartment after receiving no response (Pet. App. C, pp. 57–58). Agents Mahon and Finnigan both testified that the latter had knocked at petitioner's door and in a loud voice announced the agents' presence and purpose (Tr. A. 69–71; Tr. B. 8–9). Petitioner's contention that the agents had no reason to believe that he was at home is belied by the phone call to him by Jacoboni made two hours earlier, coupled with the lights and television being on when the officers arrived at the apartment.[5]

[4] Section 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

[5] Petitioner urges that, for there to be a refusal permitting forced entry, some affirmative act of refusal by an occupant must have been observed, rather than a silence such as greeted the agents in this case (Pet. 31). However, the cases cited in support of this argument (with one possible exception, *United States* v. *Chambers*, 382 F. 2d 910 (C.A. 6)) do not specify this requirement, but rather are merely cases in which some activity evidencing refusal was observed by the arresting officers involved. Indeed, *United States* v. *Angello*, 368 F. 2d 692, 694 (C.A. 3), cited by petitioner, explicitly held that a "refusal is present where it can reasonably be inferred from the actions or inaction of the occupants of the premises to be searched." Similarly, *United States* v. *Wylie*, 462 F. 2d 1178 (C.A. D.C.), and *Bosley* v. *United States*, 426 F. 2d 1257 (C.A. D.C.), were both instances in which the arresting officers entered the premises involved upon receiving no response to their announcement of presence and purpose.

2. Petitioner further contends that the nighttime entry into his residence and subsequent warrantless arrest constituted a violation of his Fourth Amendment rights. In *Jones* v. *United States*, 357 U.S. 493, 499–500 (see also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 480–482), the Court questioned

> * * * whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.

Our position is that the issue posed by the Court is not present in this case, because there was ample justification for petitioner's arrest without an arrest warrant.

When agent Stepp purchased 15,000 units of LSD from Jacoboni, he was told that a man named "Larry" was Jacoboni's source and that this Larry was the "number two man" in the Detroit area for such drug distribution (Tr. A. 54–55). The telephone number called by Jacoboni, which was confirmed with the hotel operator, was indeed registered to a Larry Becker. The agent specifically heard Jacoboni converse with "Larry" and order 30,000 more units, which were to be picked up within thirty minutes.[6] In these circum-

[6] On these facts, petitioner's claim (Pet. 34), echoing the dissent below, that probable cause was lacking for his arrest, in part because it was not proven "that there was anyone at the other end of Jacoboni's telephone conversation" (Pet. App.

stances, the law enforcement officers quite reasonably feared that, if time were spent securing a warrant (some time already having passed in tracing the telephone number), petitioner would become suspicious and possibly flee, having been told by Jacoboni that he would arrive in thirty minutes. Similarly, given the apparent volume of petitioner's illicit business, the agents reasonably sought to arrest him as quickly as possible in order to prevent further massive deliveries of illegal drugs. The exigencies of the situation thus dictated an immediate arrest.

3. It is additionally argued that the search of the drawer near which petitioner was standing following his arrest was impermissible under *Chimel* v. *California*, 395 U.S. 752, because petitioner was fully secured and did not pose a threat to the officers. Specifically, petitioner refers to testimony by two of the agents that, when the drawer was opened to look for weapons, no immediate danger was anticipated by them from petitioner (Pet. 7; see also the dissenting opinion below, Pet. App. B, pp. 55–56). As agent Mahon explained, however, petitioner was secure in the sense that Mahon and agent Finnigan could safely commence to search his person and the surrounding area for weapons (Tr. A. 74, 80, 91). Prior to that, petitioner persisted in turning around and refused generally to cooperate, thus preventing the officers from conducting

B, p. 48), is without substance. The agents could reasonably assume that Jacoboni, who had already provided 15,000 units of drugs from a described source, and who called a "Larry" at a number registered to a Lawrence Becker, had in fact conversed with petitioner.

even a rudimentary security check (Tr. A. 74; Tr. B. 15). The fact that petitioner finally acceded to the agents' demands that he keep his hands against the wall did not eliminate all danger and need for a search, for his person had not been searched for weapons, there was no one standing between him and the drawer which was opened by agent Mahon, and, at the time of the opening (Tr. B. 23), as the trial court judge specifically determined, petitioner's arms had not been bound (Tr. B. 23).[7] Thus, the facts of this case bring it within the ambit of permissible searches incidental to arrests as spelled out in *Chimel, supra*, 395 U.S. at 763:

> A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.[8]

Compare *People* v. *Fitzpatrick*, 32 N.Y. 2d 499, 508–509, certiorari denied, No. 73–5370, November 19, 1973.

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[7] The dissenting opinion below suggests that a long period elapsed before the drawer was searched, concluding that the search was not therefore performed for security reasons. Agent McKinnon, however, who was in charge of the arrest party, testified that the drawer was in fact searched within a minute of the agents' entry into the apartment (Tr. B. 34).

[8] As for the fact that, when the search of petitioner and the immediately surrounding area was conducted, agents Finnigan and Mahon had replaced their pistols in their respective holsters, it was explained by the former that they had been

Moreover, since the search came within the traditionally recognized area of permissible search incident to arrest, a specific showing of justification for the particular actions of the arresting officers is not required. See *United States* v. *Robinson*, No. 72–936, decided December 11, 1973.

4. Finally, petitioner alleges that the arrest constituted a pretext for a search of his residence. This claim is without substance for two reasons.

First, the district court specifically found as a fact, from the testimony of the agents, that their purpose in proceeding to petitioner's residence was to secure his arrest (Pet. App. C, p. 60). Agents Finnigan, Mahon, and McKinnon, the latter being in charge of the group which arrested petitioner, all testified that the purpose of the entry into petitioner's residence was to arrest Becker for conspiring to distribute drugs (Tr.A. 62; Tr.B. 5, 28).[9] The fact that eight agents went to the resi-

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trained, reasonably we submit, never to engage in a personal search of an arrestee with a weapon exposed to a sudden grasp (Tr. B. 24).

The suggestion of the dissenting judge below, endorsed by petitioner, that the need for a search of the immediate area might be obviated merely by hurriedly transporting the arrestee from the premises can hardly be deemed sound. To require police officers immediately to remove an arrestee from the place of his arrest, without first binding his arms or searching for weapons within reach, involves an unacceptable risk to the safety of the law enforcement officers.

[9] The dissenting opinion below stated that only agent Finnigan's testimony supported the view that the purpose of the entry was to effect an arrest and implied that his testimony was modified because he had testified some days after the other agents. The record does not bear out either this factual statement or the attendant implication. In fact, both Finnigan and

dence to make the arrest does not, as the dissent below suggests, imply a contrary purpose, for, as agent Mahon testified, this number was not deemed inordinately large considering petitioner's reputation as the "number two man" for drug distribution in the Detroit area (Tr.A. 62). Such an individual might well be expected to be dangerous or to be accompanied by others. Nor does the fact that various agents were assigned to different rooms of the apartment suggest a search purpose, for the agents, understandably, wished for security purposes to ascertain if any individuals besides petitioner were in the residence. Cf. *United States* v. *Looney*, 481 F. 2d 31 (C.A. 5), certiorari denied, No. 73–5364, December 3, 1973.

Second, even if the purpose of the law enforcement officers was to gain entry into petitioner's apartment, there was ample basis for them to do so without a warrant. There was probable cause to believe that contraband was present, and there was a real possibility that, if they delayed in order to obtain a warrant

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McKinnon testified on June 28, 1972, as to the arrest purpose of the entry. In addition, on May 22, 1972, the first day of the hearing on the motion to suppress, agent Mahon also testified to the same effect (Tr.A. 60, 62). The testimony of agent Ray, alluded to by the dissenting judge (Pet. App. B, p. 49), does not, in fact, contradict the statements of these agents. Ray merely indicated that, prior to the agents' departure to petitioner's apartment, he had been told the information relayed by agent Stepp, namely that petitioner was believed to be prepared to sell 30,000 units of drugs and that the agents were going to "find out" (Tr.A. 15). Ray also stated that no discussion of a search occurred prior to the agents' entry into the apartment (Tr.A. 19).

(possibly until the next morning), the illicit drugs would no longer be there. Under these circumstances, it is submitted, "time was clearly of the essence," and the entry without a warrant was valid. Cf. *Warden* v. *Hayden*, 387 U.S. 294, 298–299; *Ker* v. *California*, 374 U.S. 23, 41–42. As the Court observed in *Ker* (distinguishing other cases in which warrantless searches had been held invalid) (374 U.S. at 42, n. 13)):

> In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances, such as the threat of destruction of evidence, supported the Court's holdings that searches without warrants were unconstitutional. See *Chapman* v. *United States*, 365 U.S. 610, 615 (1961); *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951); *Taylor* v. *United States*, 286 U.S. 1, 5 (1932).

Here, we submit, the same exigent circumstances which justified an arrest without a warrant likewise justified an entry into petitioner's premises without a warrant to ensure that the contraband would not be removed or destroyed. Accordingly, it is immaterial what the law enforcement officers' purpose was in entering the apartment.

Finally, we note that the court of appeals held that the finding of the district court "that the officers had as their purpose the arrest of Becker, and that the arrest was not a mere ruse to conduct a search, is not

clearly erroneous" (Pet. App. A, p. 45).[10] The only issue, therefore, is whether that determination was clearly erroneous. Cf. *Neil* v. *Biggers*, 409 U.S. 188, 193, n. 3. We submit that it was not and that this factual issue does not warrant further review.

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[10] The court of appeals, although satisfied that the district court's finding was not clearly erroneous, went on to observe that "this matter deserves comment" (Pet. App. A, p. 45):

> *The Constitution contemplates that searches will be made upon the basis of a prior determination of necessity by a disinterested magistrate.* *McDonald* v. *United States*, 335 U.S. 451, 455 (1958). *The warrantless search remains the exception which must be justified. Where the justification relied upon is that the search is a necessary incident to a lawful arrest the restricted scope of this exception must be observed.* This is especially true where the search is conducted in a person's home at night. Such warrants issued pursuant to Rule 41, Fed. R. Crim. P. are subject to the following limitation:
>
> "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. Fed. R. Crim. P. Rule 41(c)." [Emphasis in original.]

While we do not take issue with the general tenor of this statement, we note that former Rule 41, Fed. R. Crim. P., to which the court of appeals alluded, was inapposite here. Nighttime searches for "controlled substances" are not governed by Rule 41(c), but by 21 U.S.C. 879(a), which has been construed by every appellate court that has considered the issue to permit such searches without any special showing beyond that of probable cause. *United States* v. *Thomas*, 489 F. 2d 664, 673–674 (C.A. 5); *United States* v. *Thomas*, 294 A. 2d 164 (D.C. Ct. App.), certiorari denied, 409 U.S. 992; *United States* v. *Gooding*, 477 F. 2d 428 (C.A. D.C.), certiorari granted, 414 U.S. 907.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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